

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MIDWAY MFG. CO., an Illinois corporation, )  
Plaintiff, ) No. 81 C 6434  
v. ) Honorable  
NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP., ) George N. Leighton  
a Tennessee corporation; )  
PARK TELEVISION d/b/a/ PARK MAGNAVOX HOME ENTERTAINMENT )  
CENTER, an Illinois partnership; and ED AVERETT, )  
an individual, )  
Defendants. )

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MEMORANDUM SUPPORTING DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT AGAINST PLAINTIFF  
MIDWAY MFG. CO.

INTRODUCTION

This memorandum will demonstrate that for various reasons plaintiff Midway Mfg. Co. ("Midway") has no basis in fact or law to maintain its action against defendants for infringement of trademark and copyright rights in the audiovisual work "Pac-Man" or any other relief. There are two independent and sufficient bases for finding, as a

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matter of law, that Midway has no justiciable claim against the defendants under either the copyright or trademark laws.

First, Midway's own complaint and the documentary evidence underlying its allegations show that Midway bartered away to co-plaintiff Atari, Inc. ("Atari") by exclusive license under its copyright and trademark rights any right to prosecute this action. Atari has dismissed its complaint against defendants under all four counts. That is the unequivocal end of at least Counts One and Two, the only Federal counts.

Second, Midway's unclean hands in its dealings with the original owner of the Pac-Man copyright and in misrepresenting its standing to obtain copyright registration and maintain this and other suits prevents any recovery by Midway for the Federal claims and any other cause of action.

Finally, whether Midway's Federal claims fail for either or both of the foregoing reasons, whatever state law cause of action for unfair competition Midway may assert, claims under the Illinois Uniform Deceptive Trade Practices Act, and claims under the Illinois Consumer Fraud Act have been preempted by federal law, or, if not preempted, should be heard only in a state court.

## FACTS

### The Atari Exclusive Sublicense

By an exclusive sublicense arrangement, Atari owns solely and exclusively the U.S. copyright and trademark rights in the video game Pac-Man for the consumer home game and personal computer markets. (Second Amended Complaint, paragraphs 10 and 11, Exhibit B). Midway has absolutely no rights therein. The exclusive license by which Midway conveyed all of its rights in Pac-Man for the consumer home video game and personal computer markets is royalty free. Thus, Midway cannot claim even an equitable interest in the PAC-MAN copyright or trademark for those fields or the right to advertise and sell PAC-MAN products in those fields.

Moreover, under the exclusive sublicense Atari has been granted for consumer home video games, Atari has the sole right to control litigation in connection with its enjoyment of the license. Furthermore, Atari was and is entitled to retain all monetary damages recovered in such litigation. (Defendants' Exhibit 100B, Defendants' Exhibit 109, paragraph 10).

Atari has now settled its differences with the defendants and its action against the defendants has been dismissed as to all counts. There is nothing left for which Midway can maintain a claim.

To the extent Midway may assert some vestigial Federal claim or right, it is in any event barred by its inequitable conduct in obtaining and manipulating any such rights. This will be clear from the following additional facts, none of which bears upon the threshold singular fact that Midway pleads exclusive rights in Atari that preclude and bar Midway from continuing to pursue this action.

Midway's Manipulation To Improperly Secure and Assert a PAC-MAN Copyright

Namco Limited, a Japanese company, allegedly created a game, "Pac-Man," originally titled "Puck Man," some time before May, 1980 and marketed it as a coin-operated arcade game. (Second Amended Complaint, paragraph 7.) Sometime prior to October 10, 1980 Midway obtained rights in PAC-MAN for coin-operated games only from Namco and its U.S. subsidiary, Namco-America, Inc. Then on October 10, 1980, Namco Limited made a feigned assignment to Midway of all right, title and interest in common law and statutory copyrights in the United States in "Pac-Man." (Second Amended Complaint, paragraph 8, Exhibit A.) In fact, that assignment was a sham and for tactical purposes only. What Midway actually received from Namco in 1980 were only the rights to PAC-MAN for coin-operated games and an assignment of naked legal title to the PAC-MAN copyright in the United States.

Midway and NAMCO entered into a simultaneous oral agreement  
that any and all rights NAMCO granted to Midway would be  
granted back to Namco at Namco's request. (Nakajima Deposition,  
pages 132-134.) The naked written assignment was a tool  
useful in the Copyright Office and in the courts in obtain-  
ing a registration and in attempting to foreclose competition,  
simulation, or copying of the PAC-MAN coin-operated game.

This was confirmed in a March 10, 1982 letter from Dennis Wood, Namco-America's counsel, to David Marofske, president of Midway, which traced the history and reasons for this oral agreement:

As you know, at first Midway was granted only the coin-operated rights to Pac-Man. Later on, at your request, we assigned to you all the rights to Pac-Man in the Western Hemisphere, so that you would have a stronger case to go after Pac-Man infringers. We did this with a verbal agreement that if at any time Namco requested the return of the rights, Midway would do so. In fact, at least on three separate occasions, either you or Stan [Jarocki, Midway's vice president] reaffirmed Midway's intention to return the rights to Namco, upon Namco's request and without payment by Namco.

The reason for having an oral agreement rather than a written one, was merely based on your argument to us saying, "that any written agreement of such kind may weaken Midway's rights against infringers, who attempt to copy the game."

(Def. Ex. 117.)

Since 1980, Midway has manufactured the video arcade game "Pac-Man" in the United States. It has never manufactured PAC-MAN games for consumer use or for personal computers. In two agreements dated April 27, 1981, over six months after the purported "assignment", Midway granted back to Namco Limited and its subsidiary, Namco-America, Inc., royalty-free, an exclusive license to Pac-Man in the consumer home video products field.

This free return of ownership is consistent with Midway's actual limited rights in PAC-MAN for coin-operated games. Namco-America, in turn, with the authorization of Midway, granted an exclusive sublicense to Atari under these copyright and trademark rights. (Amended Complaint, paragraphs 10, 11, Exhibit B.) In its exclusive sublicense to Atari, Namco-America granted Atari the sole right to control litigation in connection with its enjoyment of the license. The April 27, 1981 agreements further provided that Atari would be entitled to retain all monetary damages recovered in such litigation. (Defendants' Exhibit 100B; Defendants' Exhibit 100A, paragraph 10.)\*

In a later agreement between Namco-America and Atari dated December 9, 1981, Atari was granted the exclusive

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\* These references are to Defendants' deposition exhibits. Witnesses deposed by defendants have authenticated the documents relied on in this memorandum pursuant to F.R.Civ.P. 56(e). Defendants will supply copies of said exhibits under separate cover at the Court's request pursuant to the protective orders entered in this case.

sublicense under the Pac-Man copyright and trademark for personal computer products. This agreement also gave Atari the right to sue for infringement in its own name and in the name of Midway, with Atari having the sole right to control litigation and to retain any sums received as damages in such a dispute. (Defendants' Exhibit 100, paragraph 12.)

Thus, by a series of agreements spaced over a year or so, Atari came to hold exclusive license rights and Midway gave up (royalty-free) all rights to make and sell the home video and personal computer versions of Pac-Man, to use the copyright and trademark rights to market and promote those products, and (to enable the full enjoyment of the benefits of those rights) to initiate and control all litigation concerning infringement of those rights. By Midway's own allegation, Atari holds "the exclusive right under all copyrights to the Pac-Man audiovisual work for home video games and personal computers in the United States and its territories," as well as the "exclusive license rights to the trademark Pac-Man for use on or in connection with home video games and personal computers in the United States." (Amended Complaint, paragraphs 10, 11.)

#### The Namco License From Midway

On January 12, 1982, Namco Limited, by its president, H. Nakajima, and Midway, by its president, David Marofske

entered into a "memorandum agreement" in Tokyo concerning certain residual rights retained by Midway in the Pac-Man copyright and trademarks. (Defendants' Exhibit 116.) The purpose of this memorandum agreement, which had nothing to do with the rights held by Atari and included no monetary consideration, was to return to Namco Limited and its subsidiary, Namco-America, other rights in PAC-MAN conveyed by the feigned assignment dated October 10, 1980, i.e.:

an exclusive license to all copyright and trademark rights for motion pictures, film, live theatre, television productions, paperback and hardcover books, including but not limited to comic books, relating to Pac-Man with the right to sublicense others.

Although there was no monetary consideration for this return of ownership, Namco Limited did grant Midway certain rights of first refusal to other coin-operated games it might develop in the future. The memorandum agreement, which became effective immediately, contemplated a final agreement incorporating its terms to be executed by February 10, 1982.

In summary, contrary to its allegations in this case, Midway did not have all right, title and interest to the Pac-Man copyright and trademark in the United States. It promised Namco it would give back at any time all right, title and interest in Pac-Man outside the coin-operated game field at Namco's request. The agreement to grant back those rights was an oral one so that Midway could pretend in

the Copyright Office and in its lawsuits against alleged infringers that it had the right to obtain registration and maintain suit.

Sometime in February, 1982, Namco requested that rights in PAC-MAN be returned by Midway and Midway refused. At that time NAMCO decided to acquiesce in that refusal and to abrogation of the oral agreement (Nakajima Deposition, pages 200-210).

#### The Atari Dismissal

The initial complaint in this case was filed on November 18, 1981. Plaintiffs filed their amended complaint on February 24, 1982, about the time that Namco and Midway "nullified" their "oral" agreement, as described above. Midway has now been granted leave to file a Second Amended Complaint. (Order of January 19, 1984.) In the second amended complaint, Midway fails to allege that any copyright and trademark rights it held in the audiovisual work Pac-Man were being infringed by an audiovisual work entitled "K. C. Munchkin," a home video game developed, manufactured and sold by defendants. (Amended Complaint, paragraphs 3, 4, 5.) The four-count first amended complaint alleged violations of the Copyright Act, 17 U.S.C. § 101 et seq., the Lanham Act, 15 U.S.C. § 1225(a), the Illinois Deceptive Trade Practices Act, Ill. Rev. Stat. ch. 12 1/2, §§ 311-317, and the common law of unfair competition. On November 10, 1983, this court

dismissed plaintiff Atari's complaint against defendants on all four counts pursuant to a stipulation among defendants and Atari.

## ARGUMENT

### I. MIDWAY HAS NO RIGHT TO CONTINUE THIS ACTION.

, It is well settled that a copyright and trademark owner can dispose of its copyright interests in whole or in part. Swarovski America, Ltd. v. Silver Deer, Ltd., 537 F. Supp. 1201, 1206 (D. Colo. 1982). There is also no doubt that an exclusive license can be granted and that it conveys ownership. Id.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

17 U.S.C. §101 (emphasis added.)

It is the exclusive licensee who has the right to maintain an action for infringement:

The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.

17 U.S.C. § 501(b).

In the instant case Atari is and was admittedly the exclusive licensee of the Pac-Man copyright and trademark

for home video and personal computer use. As such, Atari, and only Atari, possessed the right to institute and maintain an action for infringement of that copyright in the home video area. "Once the copyright owner grants an exclusive license of particular rights, only the exclusive licensee and not his grantor may sue for later occurring infringements of such rights." 3 Nimmer on Copyright, § 12.02 at 12-25.

An owner of particular rights in a copyright has no standing to sue for infringement outside the area of his rights. In Eden Toys, Inc. v. Florelee Undergarment Co., Inc., 526 F.Supp. 1187 (S.D.N.Y. 1981), rev'd on other grounds (finding the license extended to the infringer's product area), 697 F.2d 27 (2 Cir. 1982), it was held that an exclusive copyright licensee in specific product areas (e.g., children's clothes) had no standing to sue for infringement in product areas not included within his license (adult clothes).

Of course an exclusive licensee may not sue for infringement of rights as to which he was not licensed, even if the subject matter of the infringement is the work as to which he is a licensee. Thus an exclusive licensee of legitimate stage rights may not claim an infringement by reason of the unauthorized production of a motion picture based upon the same work, even if the competition of such motion picture is injurious to the licensee.

3 Nimmer on Copyright, § 12.02 at 12-25.

Likewise, Midway, having conveyed any rights it ever had in the home video game area to Atari, has no standing

to sue for any alleged infringements in that area. In some cases one who conveys away a copyright interest even by assignment may retain a right to sue for infringement, but only where he retains sufficient other rights to remain the beneficial owner of the copyright interest. Cortner v. Israel, 568 F.Supp. 1217 (S.D.N.Y. 1983). Midway retained no rights whatever in the home video game field.

There is a sound reason why the 1976 Copyright Act identifies the exclusive licensee under a copyright as "owner" with the right to sue for violation of the copyright. Copyright defendants would be subjected to multiple actions if the bare legal title holder of a copyright were permitted to sue for infringement as owner when, in fact, such title holder has no property right and no injury. This case would exemplify the injustice of multiple actions if Midway is permitted to continue this litigation though Atari, the exclusive licensee and owner, has settled its case.

Even beyond the pleadings in this action, the Atari agreements make it clear that only Atari can maintain this action. In its agreement with Atari, Namco-America warranted that it was the exclusive licensee of the Pac-Man trademark and copyright rights of Midway and granted an exclusive sublicense to Atari to use the trademark and copyright in connection with consumer video products. Paragraph 10 of that agreement (Defendants' Exhibit 100A) gave Atari the sole right to control proceedings relating to any dispute or litigation in connection with its enjoyment

of the license. The same paragraph provided that Atari would be entitled to retain all monetary damages recovered as a result of such a dispute.

In another agreement between Namco and Atari dated December 9, 1981 (Defendants' Exhibit 110), Atari was granted an exclusive sublicense with respect to Pac-Man for personal computer products. This agreement again gave Atari the right to sue for infringement in its own name and in the name of Midway, with Atari to have the sole right to control litigation. Nothing was said in the agreement that would preserve any right in Midway to continue this action.

Atari, of course, settled its suit and dismissed its claim against the defendants. It had that right pursuant to its agreements with Midway and Namco. Under those same agreements and the applicable law, Midway conveyed, royalty-free, all its rights to and ownership of the Pac-Man copyright and trademark for home video and personal computer products including its right to maintain a suit for infringement. To allow Midway to continue its suit here would interfere with the Atari exclusive sublicense and its rights to "control" litigation. Such a result would contravene the well recognized principle of law that "the grant of an exclusive license implies a covenant not to do anything which would interfere with the licensee's rights to enjoy the fruits of the license." Viacom International, Inc. v. Tandem Productions,

Inc., 368 F.Supp. 1264, 1274 (S.D.N.Y. 1974) aff. 526 F.2d 593 (2d Cir. 1975). Midway could have no recovery here as it would infringe upon the exclusive sublicense and ownership of Atari. See Dodd, Mead & Co. v. Lilienthal, 514 F.Supp. 105 (S.D.N.Y. 1981).

Midway occupies a position akin to an assignor of a copyright who, having assigned all right, title and interest in the copyright, retained no benefits in the exclusive sublicense and has no standing to sue for infringement. See Walker v. University Books, Inc., 602 F.2d 859, 862-863 (9th Cir. 1979); Cortner v. Israel, 568 F.Supp. 1217 (S.D.N.Y. 1983) (summary judgment affirmed). Any rights under the Lanham Act, 15 U.S.C. § 1125(a), the Illinois Deceptive Practices Act, or the Illinois Consumer Fraud Act were also based upon the alleged copyright and trademark violation and were rights owned by Atari. Thus, the settlement with Atari and dismissal barred the continued assertion of those claims by Midway.

Accordingly, Midway has no right to continue this suit and defendants should be granted summary judgment.

II. MIDWAY'S UNCLEAN HANDS BARS ANY RECOVERY BY IT IN THIS SUIT.

Even if one assumes that Midway possesses some rights it might assert despite the Atari sublicense and ownership of the copyright and trademark rights, compelling reasons dictate that Midway should not be allowed to maintain

this action. Contrary to its express allegations in obtaining rights in PAC-MAN and in this case that it owned the Pac-Man copyright and trademark rights in the U.S., Midway had a long standing secret oral agreement with its original assignor Namco whereby Namco really owned all right, title and interest in Pac-Man and it could reclaim legal title whenever it wanted for no apparent consideration.

Indeed, the only reason Midway was originally given the rights to Pac-Man was to convince the Copyright Office, this Court and others that Midway had ownership and standing to assert rights and maintain suits for infringement in the home video field. In short, during much of the pendency of this suit and until Midway and Namco "nullified" their secret oral agreement in 1982, Midway's allegation that it possessed all right, title and interest in the Pac-Man copyrights and trademark was false. By obtaining the copyright registration and prosecuting this action during that time, Midway misrepresented to this Court that it had standing to sue defendants. It exhibited a lack of candor and good faith which bars continuation of this action.

Midway is guilty of unclean hands barring any recovery by it against defendants. A party coming before a court of equity must do so with clean hands. Where a plaintiff has acted in bad faith towards the Court and its opponents, all of its claims for equitable and legal

relief are precluded by the clean hands doctrine. International Union v. Local Union No. 589, 693 F.2d 666, 672-673 (7th Cir. 1982); F.E.L. Publications v. Catholic Bishop of Chicago, 506 F.Supp. 1127, 1137 (N.D. Ill. 1981) rev. on other grounds, 1982-1 CCH Trade Cases ¶ 64,632 (1982). In similar contexts courts of this district have precluded plaintiffs from recovering based on the unclean hands doctrine. In Urecal Corp v. Masters, 413 F.Supp. 873, 875 (N.D. Ill. 1976), a plaintiff misrepresenting the validity of its trademark was denied relief based on the doctrine. Similarly, in International Biotical Corp. v. Associated Mills, Inc., 239 F.Supp. 511 (N.D. Ill. 1964) a plaintiff rendered its claims unenforceable by making false statements concerning its copyright.

In the instant context similar reasoning applies. Midway has alleged it owns all right, title and interest in the Pac-Man copyright and trademark in the United States. In fact Midway's original assignor Namco merely feigned an assignment to Midway at Midway's request and was entitled to retrieve its ownership whenever it wanted without consideration to Midway. Midway's agreement with Namco in this regard was made orally so as to hide from the Copyright Office, from this Court and from alleged infringers Midway's lack of ownership standing.

Wholly aside from the secret oral agreement, Midway had no rights infringed by the development, manufacture and

sale of the K.C. Munchkin game. A review of the Atari sublicense agreements indicates that Atari has the right to promotional products in the consumer video areas. Atari, for example, was given the right to market Pac-Man novelty items (Defendants' Exhibit 100B, paragraph 2(e)), and has the right to use the Pac-Man trademark and copyright in consumer video games. (Defendants' Exhibit 100A, paragraph 3.) Thus, even an allegation of some vestigial right in Midway of that type would be untenable. Finally, Midway itself has alleged that Atari has the exclusive rights to the trademark Pac-Man in the consumer video area. (Amended Complaint, paragraph 11.) Under these circumstances, Midway has only alleged infringement of rights it does not possess in Pac-Man.

In short, Midway possesses no copyright or trademark right in the alleged area of infringement, has given away its right to maintain and control this suit to Atari and has misrepresented to the Copyright Office and this Court its ownership of the audiovisual work and right to maintain this suit. Accordingly, under the facts and law, summary judgment should be entered for defendants against Midway on its copyright and trademark claims.

III. WHATEVER OTHER RIGHTS MIDWAY HAS TO MAINTAIN THIS SUIT HAVE BEEN PREEMPTED OR SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

There remains only the question of whether Midway has some right under the Illinois Deceptive Trade Practices

Act, the Illinois Consumer Fraud Act, or the common law of unfair competition which allows it to maintain this suit for infringement. Certainly Midway has alleged no right to protection under those laws different from its federal copyright and trademark claims. The four-count amended complaint repeats the same allegations in each count. Midway repeatedly alleges in all four counts that defendants have, by marketing K. C. Munchkin, created the false impression that K. C. Munchkin is backed by, sponsored by or otherwise associated with Atari and Midway, have otherwise confused the public as to the source, sponsorship or approval of K. C. Munchkin and have caused or assisted in the "passing off" of K. C. Munchkin as a Pac-Man game. (Amended Complaint, paragraphs 17, 19, 20.) All such claims are actually alternate statements of the copyright and trademark causes and are now barred by the Atari dismissal.

The same licensing agreements giving Atari the right to maintain suit for copyright and trademark infringement should govern Midway's right to sue under state law. Defendants refer the Court to their argument above on this point. There are additional compelling reasons to dismiss Midway's state law claims.

Section 301 of the Copyright Act of 1976 provides that federal copyright law exclusively governs works of authorship that are within the subject matter of copyright and all legal and equitable rights that are equivalent to

the exclusive rights within the scope of the federal copyright law. 17 U.S.C. § 301. By the express terms of Section 301(a), the Copyright Act of 1976 preempts the common law or statutes of any state.

Section 301 establishes a two-pronged analysis for preemption under the 1976 Copyright Act: (1) whether the nature of the work at issue is within the subject matter of copyright as defined in Sections 102 and 103 and (2) whether the rights granted under the state law are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 of the Act.

Schuchart & Associates v. Solo Serve Corp., 540 F.Supp. 928 (W.D. Tex. 1982). See also: Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed.2d 661 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed.2d 669 (1964); Goldstein v. California, 412 U.S. 546, 93 S. Ct. 2303, 37 L. Ed.2d 163 (1973)..

In the instant case, Midway has alleged that the audiovisual work, Pac-Man, is copyrightable matter within the protection of the Copyright Act. (Amended Complaint, paragraph 7.) Thus, for purposes of this motion the first prong is satisfied. The second prong of the test is satisfied if the rights Midway seeks to protect under state law are equivalent to the rights enumerated under the

Copyright Act.\* It is, however, unnecessary to analyze the elements of a claim for unfair competition in violation of Illinois law. Midway has lumped together its claims for copyright infringement, common law unfair competition and deceptive trade practices. In the context of these specific allegations, which is the focus this court must take, Schuchart & Associates v. Solo Serve Corp., 540 F.Supp. at 944, Midway seeks to enforce state law rights substantially equivalent to those within the general scope of copyright. Id. Thus, the second prong of the test is satisfied. Accordingly, Midway's state law claims are preempted. See Suid v. Newsweek, 503 F.Supp. 146 (D.C.D.C. 1980) (summary judgment granted defendant where plaintiff's copyright was not infringed, thereby preempting state law unfair competition claim).

In the recent case, Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983), decided December 2, 1983, defendant, petitioner Crow was convicted of dealing in stolen property, arising from the sales of bootleg eight-track tapes which were copyrighted. In reversing a denial of a writ of habeas corpus, the Eleventh Circuit articulated the law of federal pre-emption in copyright matters:

\* Section 106 provides that a copyright owner has exclusive rights to do and to authorize (1) the reproduction of copyrighted work (to make copies); (2) the preparation of derivative works based on his copyrighted work; and (3) the distribution of copies of the copyrighted work to the public or by sale or other transfer of ownership. 17 U.S.C. § 106.

The legislative history of section 301, which Congress passed in 1976, clearly evidences Congress' intent to overrule by statute cases such as *Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) (holding that the Copyright Act of 1909 preempts only state laws conflicting or interfering with its provisions). The Report of the House of Representatives states:

The intention of section 301 is to pre-empt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal way possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress should act preemptively, and to avoid the development of any vague borderline area as between State and Federal Protection.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S.Code Cong. & Ad.News 5659, 5746.

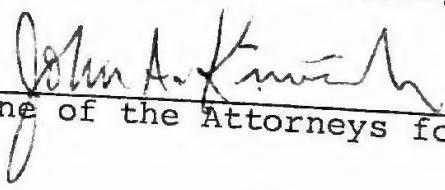
Finally, even if Midway has stated a claim for relief under Illinois law different in kind from those rights protected under the Copyright Act, those claims should be dismissed. Plaintiff has alleged that this Court has pendent jurisdiction over those claims pursuant to 28 U.S.C. § 1338(b). (Amended Complaint, Section 6.) Where, as here, Midway's claim under the copyright laws are dismissed prior to trial, its pendent state law claims should also be dismissed. Burns v. Rockwood Distributing Co., 481 F.Supp. 841, 848 n.2 (N.D. Ill. 1979); Davis v. United Artists, Inc., 547 F.Supp. 722, 728 (S.D.N.Y. 1982). This is in keeping with the general rule that pendent state law claims

should be dismissed whenever federal claims are dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed.2d 218, 86 S. Ct. 1130 (1966); Lyznicki v. Board of Education, 707 F.2d 949 (7th Cir. 1983); Cook v. Weber, 698 F.2d 907 (7th Cir. 1983).

#### CONCLUSION

For all of the above reasons, defendants pray that summary judgment be entered on defendants' behalf and against Midway.

Respectfully submitted,

  
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